No. 86-730 (3)

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

GERALDINE G. CANNON,
Petitioner,

v.

LOYOLA UNIVERSITY OF CHICAGO, *et al.*,
Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. Mrs. Cannon Fails To Demonstrate That The Decision Below Conflicts With Decisions of This Court And Of Other Circuits	7
II. Mrs. Cannon's Eleventh Amendment Contentions Are Without Merit	9
REQUEST FOR SANCTIONS	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

	Page
Bell v. *Hood*, 327 U.S. 678 (1945)	7 - 8
Cannon v. *University of Chicago, et al.*, 406 F. Supp. 1257 (N.D. Ill. 1976), *aff'd*, 559 F.2d 1063 (7th Cir. 1977), *rev'd*, 441 U.S. 677 (1979), *dismissal on remand aff'd*, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981)	2 - 5, 7 - 9
Cannon v. *University of Health Sciences, et al.*, 710 F.2d 351 (7th Cir. 1983)	4 - 5, 8 - 9
Carter v. *Telectron, Inc.*, 554 F.2d 1369 (5th Cir. 1977), *cert. denied*, 439 U.S. 1074 (1979)	7 - 9
Costello v. *United States*, 365 U.S. 265 (1960)	7
In re TCI Ltd., 769 F.2d 441 (7th Cir. 1985)	10
Johnston v. *Earle*, 245 F.2d 793 (9th Cir. 1957)	7 - 8

Constitution and Statutes

U.S. Const., amend. XI	9
20 U.S.C. §1681 *et seq.*, Title IX of the Education Amendments of 1972	3 - 5
29 U.S.C. §626, Age Discrimination in Employment Act of 1967	2 - 3
42 U.S.C. §295h-9, Section 9 of the Public Health Service Act	3
42 U.S.C. §1983, Civil Rights Act of 1871	3 - 4
42 U.S.C. §6101 *et seq.*, Age Discrimination Act of 1975	4

Other

Federal Rules of Civil Procedure, Rule 11	10

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JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Geraldine G. Cannon asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit based on her contention that the Court of Appeals, in its opinion issued February 25, 1986,[1] erred in affirming the dismissal of her complaint as barred by the judgments in her three prior lawsuits against the respondents.

Specifically, Mrs. Cannon argues that the dismissal of two prior actions for failure to state a claim upon which

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[1] *Cannon* v. *Loyola University of Chicago*, 784 F.2d 777 (7th Cir. 1986). A copy of the opinion appears in the Appendix to the petition at A-1. References to the Appendix will be given as "A-___" and to the Supplemental Appendix filed later by Mrs. Cannon as "Supp. App. ___."

relief could be granted and of legal claims in the third suit on Eleventh Amendment grounds were dismissals for lack of jurisdiction and could not bar the present suit.

Respondents Loyola University of Chicago ("Loyola"), Northwestern University ("Northwestern"), Rush–Presbyterian–St. Luke's Medical Center ("Rush"), Southern Illinois University ("SIU"), The University of Chicago ("Chicago"), the University of Health Sciences/The Chicago Medical School ("Chicago Medical"), and the Board of Trustees of the University of Illinois ("Illinois") respectfully submit that the decision of the Court of Appeals was fully consistent with previous decisions of this Court and that the Petition should be denied.

STATEMENT OF THE CASE

This petition for a writ of certiorari is but the latest in a long series of unsuccessful lawsuits, motions for reconsideration, and appeals all stemming from Geraldine G. Cannon's failure to be admitted to medical school in 1975 and thereafter. Indeed, as the Seventh Circuit Court of Appeals noted in the decision which plaintiff seeks to have this Court review (A-2):

> The present appeal marks the plaintiff's *thirteenth time* she has been before the court to obtain judicial relief from the decisions of the universities not to admit her to medical school ten years ago. (Emphasis added.)

Mrs. Cannon first applied for admission to the September 1975 entering classes of ten medical schools, including all seven in Illinois, which are the respondents here. None of the ten schools offered her admission.

In July 1975 Mrs. Cannon filed lawsuits in the United States District Court for the Northern District of Illinois against The University of Chicago (75-C-2402) ("*Cannon I*") and Northwestern University (75-C-2424) ("*Cannon II*"). In both suits Mrs. Cannon alleged that the defendants had violated the Age Discrimination in Employment

Act, 29 U.S.C. §626 ("ADEA"), by considering the age of applicants; or, in the alternative, that such consideration of age had a disparate impact upon females in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* ("Title IX"), the Civil Rights Act of 1871, 28 U.S.C. §1983 ("§1983"), or Section 799 of the Public Health Service Act, 42 U.S.C. §295h-9.

The district court consolidated Mrs. Cannon's two suits and dismissed the complaints on the grounds that there was no state action upon which to ground a §1983 claim, there was no basis for an ADEA cause of action because defendants were neither employers nor employment agencies with respect to plaintiff, and there was no private right of action under either Title IX or the Public Health Service Act. *Cannon* v. *University of Chicago*, 406 F. Supp. 1257 (N.D. Ill. 1976). The Seventh Circuit affirmed. 559 F.2d 1063 (7th Cir. 1977).

This Court granted plaintiff's petition for a writ of certiorari solely on the issue of whether a private right of action could be implied under Title IX and subsequently found that a private action could be maintained under the statute. 441 U.S. 667 (1979).

Upon remand, The University of Chicago and Northwestern moved to dismiss Mrs. Cannon's complaint. The district court found that Title IX could be violated only by purposeful or intentional discrimination and that Mrs. Cannon alleged only a disparate impact upon females. The district court therefore dismissed the complaint for failure to state a claim upon which relief could be granted. Unpublished Orders, Nos. 75-C-2402 and 75-C-2724 (N.D. Ill. May 23, 1980). The Seventh Circuit affirmed that decision and denied Mrs. Cannon's subsequent motions to amend. 648 F.2d 1104 (7th Cir. 1981). The Supreme Court denied plaintiff's petition for a writ of certiorari. 454 U.S. 1128 (1981).

In addition, while defendants' motions to dismiss

Cannon I and *Cannon II* were pending, Mrs. Cannon sought injunctive relief, petitioning the district court for a preliminary injunction that would require defendants to admit her to the 1979 entering class at their medical schools. After a six-day evidentiary hearing, the district court denied Mrs. Cannon's request for an injunction, and the Seventh Circuit affirmed the denial. Unpublished Order, Case No. 79-2207 (7th Cir. April 25, 1980).

Then in 1979 Mrs. Cannon filed suit against the five other medical schools in Illinois, which are also respondents here – Loyola University of Chicago, Rush-Presbyterian-St. Luke's Medical Center, Southern Illinois University, the University of Health Sciences/The Chicago Medical School, and the University of Illinois (79-C-5009) ("Cannon III"). In this suit plaintiff alleged that defendants' denials of her medical school applications were sex discrimination in violation of Title IX; age discrimination in violation of the Age Discrimination Act of 1975, 42 U.S.C. §§6101-07; and, with respect to S.I.U. and Illinois, a violation of 28 U.S.C. §1983. The district court dismissed the action as to Rush, Loyola, and Chicago Medical on grounds of laches and as to S.I.U. and Illinois on grounds of mootness. Unpublished Orders, No. 79-C-5009 (N.D. Ill. October 13, 1981 and June 15, 1981). The Seventh Circuit Court of Appeals affirmed the judgment as to all defendants but ruled as to S.I.U. and Illinois on grounds of laches rather than mootness.[2] *Cannon* v. *University of Health Sciences*, 710 F.2d 351 (7th Cir. 1983).

Mrs. Cannon then filed her fourth lawsuit, this time

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[2] The Medical College Admissions Test ("MCAT") had been drastically changed since Mrs. Cannon took the test in 1974. The district court therefore found and the Court of Appeals affirmed that there had been a prejudicial change in circumstances such as to constitute laches (see Supp. App. C-5 - C-6, C-19 - C-21).

naming all seven schools sued in *Cannon I* through *Cannon III* as defendants (Case No. 84-C-8063) ("Cannon IV"). In *Cannon IV* Mrs. Cannon again alleged that defendants had violated Title IX, based upon her theory that using age as a criterion for admission to medical school, although not unlawful in itself when she applied to medical school, had a disparate impact upon women. In an effort to avoid the effect of the rulings in *Cannon I* through *Cannon III*, Mrs. Cannon labelled this action a breach of contract. Inasmuch as the "breach of contract" alleged here was in fact identical to the alleged violations of Title IX and other statutes that Mrs. Cannon had alleged in her three previous actions and that had been ruled upon in those actions, the district court dismissed *Cannon IV* and awarded defendants their attorneys' fees and costs. *Cannon* v. *Loyola University of Chicago*, 609 F. Supp. 1010 (N.D. Ill. 1985). The Seventh Circuit affirmed the dismissal on the ground that this action was barred by the rulings in the previous suits against these defendants, affirmed the award of attorneys' fees and costs, and awarded additional fees and costs to defendant for the appeal. 784 F.2d 777 (7th Cir. 1986). Mrs. Cannon now seeks a writ of certiorari on that ruling.

It should also be noted that after the Seventh Circuit affirmed the dismissal of *Cannon IV* as barred by the rulings in Mrs. Cannon's prior suits and while Mrs. Cannon's motions for rehearing were pending, she filed a fifth suit against the same seven defendants in state court alleging again that the defendants' rejection of her applications had breached a contract by violating Title IX. Defendants filed a timely petition for removal on the ground that Mrs. Cannon had alleged a federal question by grounding her complaint upon supposed violations of Title IX (Case No. 86-C-5437) ("*Cannon V*"). After removal, defendants moved for dismissal and sanctions including fees and an injunction barring the continued filing of suits against these defendants based

upon the same factual allegations as *Cannon I* through *Cannon V*. The district court dismissed *Cannon V*, holding that this case was "yet another clone of plaintiff's earlier suits against the defendants." Unpublished Order, No. 86-C-5431 (N.D. Ill. August 4, 1986). The motion for sanctions is still pending. Based upon the history of Mrs. Cannon's litigation against the medical schools which rejected her applications in 1975 and thereafter, there is every likelihood that Mrs. Cannon will take *Cannon V* on the same lengthy, time-consuming, and costly journey through the courts that we have seen from *Cannon I* through *Cannon IV*.[3]

REASONS FOR DENYING THE WRIT

As the history of Mrs. Cannon's attacks on the rejections of her medical school applications clearly demonstrates, she willfully refuses to recognize that she has had her day in court – and, in fact, much more. Instead, she persists in bringing the same allegations before the courts under different labels and ceaselessly prolongs her vexatious litigation. Much as Mrs. Cannon might wish to keep this litigation alive, neither the facts nor the law give any support to that wish. She has not stated any grounds whatsoever upon which she is entitled to a further review by this Court and her petition for a writ of certiorari must be denied.[4]

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[3] It should be noted that all seven defendants are non-profit institutions. Justice Powell in his dissent in *Cannon* v. *University of Chicago*, 441 U.S. 677, 747 (1979), expressed concern regarding imposing "[t]he burden of expensive, vexatious litigation upon institutions whose resources are often severely limited . . . ." The history of Mrs. Cannon's litigation demonstrates that Justice Powell's concern was well-founded.

[4] As counsel for respondents pointed out in oral argument in *Cannon III* and as the Seventh Circuit noted in ruling on that appeal, Mrs. Cannon could seek admission to medical

(Footnote continued on the following page)

I. Mrs. Cannon Fails To Demonstrate That The Decision Below Conflicts With The Rulings Of This Court Or Of Other Circuits.

Mrs. Cannon bases her petition first upon her contention that the ruling in *Cannon I and II* should not be considered a final judgment on the merits and that the Seventh Circuit's decision giving the *Cannon I and II* ruling preclusive effect conflicts with this Court's decision in *Costello* v. *United States*, 365 U.S. 265 (1961), and with decisions of other circuits in *Carter* v. *Telectron, Inc.*, 554 F.2d 1369 (5th Cir. 1977), *cert. denied*, 439 U.S. 1074 (1979), and *Johnston* v. *Earle*, 245 F.2d 793 (9th Cir. 1957). This argument however flatly ignores what was in fact decided in *Cannon I and II*. The courts found there that Title IX could be violated only by *intentional* discrimination on the basis of sex – not by actions alleged to have a disparate impact – and further found that Mrs. Cannon did not allege any action by The University of Chicago and Northwestern that could be deemed intentional discrimination. On that basis, it was found that Mrs. Cannon failed to state a claim upon which relief could be granted. In other words, even if taken as true in every particular, what Mrs. Cannon had alleged was not a violation of federal law. As this Court stated in *Bell* v. *Hood*, 327 U.S. 678, 681-82 (1945):

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4 *(Continued)*
school at any time simply by taking the revised Medical College Admission Test and reapplying to the defendant medical schools, none of which consider age in any way at present (Supp. App. C-20). The Seventh Circuit noted that perhaps Mrs. Cannon would not be competitive with others applying for medical school at present and observed (Supp. App. C-20 n. 11):

> This uncertainty, in fact, appears to be the reason Cannon continues to press for equitable relief in the face of statements by the defendants that she would receive due – and nondiscriminatory – consideration when and if she reapplied.

> . . .it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

The Seventh Circuit properly relied upon this language in affirming the dismissal of *Cannon IV* (A-6).

Likewise, the decision in *Cannon III* that Mrs. Cannon's action was barred by a prejudicial change in circumstances – *i.e.*, the change in the Medical College Admissions test after she took that test – was a decision that reached the merits of Mrs. Cannon's claim and disposed of the case on that basis. The Seventh Circuit Court of Appeals therefore properly found that Mrs. Cannon's action was also barred by the doctrine of *res judicata* as to the other five medical schools named in *Cannon IV*.

That decision of the Seventh Circuit does not conflict with rulings in other circuits or by this Court. The issue in *Johnston* v. *Earle*, 245 F. 2d 793 (9th Cir. 1957), was whether the federal court had jurisdiction of a strictly state-law claim of tortious seizure and conversion of plaintiff's property by officers of the Internal Revenue Bureau, absent diversity or pendent jurisdiction. Having obtained a favorable judgment on the merits below, the defendants abandoned their contention on appeal that the federal district court lacked jurisdiction. The Ninth Circuit properly held that (245 F.2d at 794):

> Such an abandonment of jurisdiction cannot create it where absent, however pleasing to these office holders it would be if we sustained their successful contentions on the merits below.

This is far different from a situation in which – as in the instant case – the federal court has jurisdiction of the subject matter of plaintiff's claim but finds that the allegations of the complaint do not state a violation of the federal statute in question and that plaintiff therefore has failed to state a claim.

Carter v. *Telectron, Inc.*, 554 F.2d 1369 (5th Cir.

1977), is equally inapplicable to the instant case. *Carter* concerned circumstances in which the plaintiff had sought only to have the Fifth Circuit modify a lower court dismissal for lack of jurisdiction to a dismissal without prejudice. Mrs. Cannon did not seek such relief in any of her prior suits, and the rulings in those suits, which were affirmed by the Seventh Circuit and upon which this Court denied certiorari, all operate as final judgments on the merits of Mrs. Cannon's allegations of discrimination.

Nor does this Court's decision in *Costello* v. *United States,* 365 U.S. 265 (1961), aid Mrs. Cannon's position. This Court did not suggest anywhere in *Costello* that dismissals of complaints in circumstances like those of *Cannon I* through *Cannon III* do not operate as final adjudications precluding the refiling of the same complaint under a different label. Indeed, it is clear that, where the courts have found that the allegations of a complaint do not constitute a violation of a federal statute or that the complaint is barred on the grounds of laches or mootness, a final judgment has been made upon the merits of the case.

In short, the Seventh Circuit's well-reasoned rejection of Mrs. Cannon's attempt to bring her previously dismissed claims against these defendants under a new label was correct and in no way conflicts with decisions of this Court and other circuits.

II. Mrs. Cannon's Eleventh Amendment Contentions Are Without Merit.

Contrary to Mrs. Cannon's contention, she raises no unsettled question of federal law with respect to the Eleventh Amendment issues herein. Mrs. Cannon's entire concern with this issue is speculative inasmuch as the question she seeks to pose is the possible *res judicata* effect of a decision in a federal action for prospective relief permitted by the Eleventh Amendment "on the issue of liability in a later state court action for retrospective relief" (Petition at 9). This question is purely hypotheti-

cal, and it is not the function of the Supreme Court to issue advisory opinions on such questions.

REQUEST FOR SANCTIONS

As the history of this litigation demonstrates, Mrs. Cannon has pursued her claims far beyond the bounds of good faith. As the district court held in *Cannon IV* in awarding sanctions (Supp. App. B-11):

> Attorneys are expected, even required, to represent their clients' interests zealously. But they are also expected to know when to give up on an obviously lost cause. It should have been apparent to Cannon's counsel that Cannon's cause was dead.

Likewise, the Court of Appeals held in affirming the award of fees and costs and granting additional fees and costs (A-8):

> We are in complete agreement with the district court that Mrs. Cannon's filing of a complaint in this action was an egregious and blatant violation of Rule 11 of the Federal Rules of Civil Procedure.

Plaintiff's continued pursuit of this groundless lawsuit after the sharp rebukes by the district court and the Seventh Circuit Court of Appeals manifests a total disregard by plaintiff and her counsel of judicial process and the obligations of a lawyer to that process. Rule 11 requires that "lawyers who litigate carelessly now must take the consequences." *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985). Defendants therefore request that this Court award them their attorneys' fees and costs incurred in responding to Mrs. Cannon's petition for a writ of certiorari.

CONCLUSION

For all the reasons stated above, defendants respectfully request that the United States Supreme Court deny plaintiff's petition for a writ of certiorari and award defendants their costs and attorneys' fees.

Respectfully submitted,

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